

12 September 2023

Angela Walker
Deputy Director, Counter Avoidance
HMRC

Via email: [REDACTED]

Dear Angela

New Criminal Offence for Promoters of Tax Avoidance

We write in response to the draft legislation published by HMRC on 18 July 2023¹ which introduces a new strict liability criminal offence for a person who, without reasonable excuse, fails to comply with a stop notice issued by HMRC requiring them to stop promoting a tax avoidance scheme.

We would like to thank you and your colleagues for their time recently to discuss the issues set out in this letter.

About the CIOT

The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.

The CIOT supports the taking of a robust approach to those who continue to promote tax avoidance schemes. There should be no place for such people and their schemes in the tax services market. Such behaviour directly contravenes the standards for tax advisers set out in Professional Conduct in Relation to Taxation (PCRT)².

¹ <https://www.gov.uk/government/publications/dealing-with-promoters-of-tax-avoidance>

² Professional Conduct in Relation to Taxation (PCRT) sets out the fundamental principles and standards of behaviours that all CIOT members, affiliates and students must follow: <https://assets-eu-01.kc-usercontent.com/220a4c02-94bf-019b-9bac-51cdc7bf0d99/d0836d40-5102-4ac1-89f3-efc9b7c75e8a/CIOT%20-%20PCRT%2003.01.23.pdf>

Our concerns – a constitutional line being crossed

However, whilst we strongly support the raising of standards in the tax advice market and driving out the bad actors, this needs to be done in a way that has due process with adequate safeguards. In our view the proposed new criminal offence fails this test.

We set out our concerns in our recent response to HMRC's consultation document³. These concerns have not been addressed in the draft legislation or in HMRC's response.

In our view, an important constitutional line is being crossed by this legislation, namely that (in principle at least) something can potentially be a crime on HMRC's say-so given that a decision to issue a stop notice will rest entirely with HMRC with no external oversight.

The lack of external scrutiny prior to the issue of the stop notice presents a risk that a notice could be incorrectly issued and / or inappropriately targeted with significant consequences for the promoter concerned.

Current appeal process is flawed

The position is exacerbated by the fact that:

- (a) if, on appeal against the stop notice, the Tribunal determines that the stop notice shall 'cease to have effect' *ab initio*, it is unclear that this rescinds the criminal offence which has already been committed under proposed new s277A(1) Finance Act 2014.
- (b) even if such a retrospective decision by the Tribunal does rescind the criminal offence, this puts intolerable pressure on a Tribunal in deciding (under s236E(5) Finance Act 2014) from what date the stop notice should cease to have effect: if the Tribunal chooses that the cessation should be prospective only (or from any date other than *ab initio*) then the Tribunal will be confirming the criminal offence; and
- (c) even if the avoidance scheme is ultimately found to work by the courts, the criminal offence of failure to comply with the stop notice will still have been committed.

The proposal also places a very high level of reliance on HMRC's internal governance working effectively. In addition, the governance process needs to be clearly articulated and transparent; at the moment it is too lacking in detail and visibility to provide external stakeholders with confidence that it is robust enough to avoid inappropriate use of the power.

HMRC governance process should be published – but this isn't sufficient to correct flaws

We would support HMRC publishing the steps involved in the decision to issue a stop notice so external stakeholders can have a clearer understanding of HMRC's governance process. We would also support HMRC publishing the steps that would be involved in a decision to prosecute a promoter for the new offence of failing to comply with a stop notice.

However, in our view this is not enough. There should be a higher external level of scrutiny before a stop notice is issued that will in future carry with it the risk of criminal charges. Using the existing safeguards which were designed for a regime attracting civil financial penalties, rather than criminal sanctions, will not be adequate. We recognise that HMRC want the process of issuing a stop notice to be quick, but having had discussions with your team, it appears that

³ Tougher consequences for promoters of tax avoidance – CIOT response 20 June 2023
<https://assets-eu-01.kc-usercontent.com/220a4c02-94bf-019b-9bac-51cdc7bf0d99/634300e0-55f4-4050-93e1-c6c1a9aab2ef/230620%20Tougher%20consequences%20for%20promoters%20of%20tax%20avoidance%20-%20CIOT%20response.pdf>

there is already a detailed internal process within HMRC before a stop notice is issued. We do not think, therefore, that the following proposal should unduly delay the process. (And, in any event as noted above, this should not be at the expense of due process and adequate safeguards).

Ex-parte application to Upper Tribunal

The suggestion we made in our consultation response was that HMRC should have to make an ex-parte application to the Upper Tribunal (Tax and Chancery Chamber) for 'judicial' approval before a criminal stop notice can be issued.

We do not believe that adding this additional step would significantly slow down the process of issuing a criminal stop notice and it would provide that extra level of assurance for all the parties involved, including HMRC, that a stop notice that carried with it the most serious consequences if ignored had been appropriately issued.

The exact question for the Upper Tribunal would no doubt need refinement, but there are a number of precedents (summary judgement, 'balance of convenience', prima-facie case) which could be adapted. Our broad suggestion is that the Upper Tribunal judge should confirm:

- that the technical conditions for a stop notice are met
- that, under s236A, the judge (rather than the authorised officer) considers that condition A and any of conditions B and C are met or that conditions B and D are met
- that HMRC have made out a prima facie case that it is more likely than not that civil consequences would be insufficient to persuade the promoter to cease promoting the particular arrangements; and
- that in all the circumstances ('balance of convenience') it is appropriate that failure to comply with the stop notice should carry criminal sanctions.

This test can obviously be refined, but we do not think that an ex parte application of this nature should be a lengthy process: it is akin to the process for emergency injunctions which judges are already well used to.

Given that the likely number of such notices will remain limited, we do not think that this places an undue resource constraint on the Upper Tribunal.

The ex parte decision could also be made unappealable to prevent the promoter from being able to slow the process down by challenging the judge's decision (provided the current appeal right against the stop notice itself remained).

Offshore promoters

We are also doubtful whether the measure will achieve the policy objective of deterring promoters – particularly those outside the UK - from continuing to promote their schemes. We should be grateful if HMRC would explain how this will affect promoters situated outside the UK, particularly with no assets here either, for example by accessing mutual assistance legal treaties to help enforce the measure which we would welcome as a positive step. It may also be that additional publicity setting this out would help those external promoters understand that this new offence could realistically affect them.

We appreciate that very few stop notices have been issued so far so it may be too early to draw firm conclusions, but it would be helpful to understand how much of the problem this measure is seeking to address is caused by UK based promoters rather than those based overseas. It will no doubt be easier for HMRC to enforce the measure against UK based promoters than those operating outside the UK.

Conclusion

Finally, we do express some surprise that the draft legislation was published so quickly after the consultation closed. We recognise that there is ministerial appetite to introduce the offence (having been announced by the Chancellor at the March Budget), and it was helpful to hear your team's assurances as to the consideration given, but in our view the speed at which it is being brought in and the failure to address the concerns that were raised by consultees undermine the consultation process.

We would like to understand whether HMRC and ministers acknowledge that this proposed offence represents a significant constitutional departure, and as such it is something we will continue to raise our concerns about through the Finance Bill process.

We will be publishing this letter, and your response, on our website. We would be happy to continue to engage with you to discuss our concerns and suggestions further and look forward to your response.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gary Ashford', with a long horizontal flourish extending to the right.

Gary Ashford
President

The Chartered Institute of Taxation

The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

Our stated objectives for the tax system include:

- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.

Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.